

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 130611-U

Order filed March 14, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

<i>In re</i> G.D.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit
a Minor)	Will County, Illinois,
)	
(The People of the State of Illinois,)	
)	Appeal No. 3-13-0611
Petitioner-Appellee,)	Circuit No. 07-JA-37
)	
v.)	
)	Honorable
Gerald D., Sr.,)	Carmen Goodman and
)	Paula Gomora,
Respondent-Appellant).)	Judges, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court
Justices McDade and Schmidt concurred in the judgment.

ORDER

Held: Trial court's determinations that Gerald was unfit and it was in G.D.'s best interest to terminate his parental rights was not against the manifest weight of the evidence. The trial court's failure to admonish Gerald regarding his right to testify did not deny Gerald due process. We affirm the termination of Gerald's parental rights.

¶ 2 The State filed a neglect petition in March 2007, alleging that G.D., who was born on March 17, 2007, had cocaine in his system at birth. G.D.'s father was unknown and jurisdiction over him was obtained through publication. G.D.'s mother admitted the neglect allegations and G.D. was placed in the foster care of Jerry and Elizabeth H. on March 21, 2007. In October 2007, the State filed a petition to terminate parental rights. The trial court defaulted both parents and granted the State's petition to terminate on November 13, 2007. The following week, respondent Gerald D. contacted the Department of Children and Family Services (DCFS) case manager handling the case and admitted he was G.D.'s father. A paternity test confirmed his claim. The trial court vacated the default order and the State withdrew its petition to terminate parental rights to enable DCFS to create a service plan for Gerald.

¶ 3 A service plan was entered with a goal to return G.D. home within 12 months. The service plan required Gerald to engage in various tasks, including participating in substance abuse treatment and attending Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings; maintaining a drug-free lifestyle; keeping monthly contact with the DCFS case manager; submitting random drug tests, attending parenting class, and participating in supervised visitation with G.D. The foster parents moved to intervene in the termination proceedings and the trial court granted the motion after a hearing. In September 2011, the trial court granted Gerald's motion to give DCFS discretion to place G.D. with Gerald, and G.D. was placed with his father on September 27. On October 4, Gerald was arrested, and on October 7, the State filed an emergency motion to vacate the order granting placement, alleging that Gerald had engaged in criminal activities and was arrested in G.D.'s presence. Gerald responded that he was out on bond the same day he was arrested and that there were no safety issues regarding G.D., who was with Gerald's brother after the arrest.

¶ 4 The State presented testimony at the hearing on the State’s motion that established Gerald’s wife, Margaret, and his stepson found a wallet at a Walgreen’s and used credit cards they found in the wallet to purchase various items, including a cellular phone Margaret gave to Gerald. Gerald used an automatic teller machine (ATM) to check the credit card balance. Gerald was later stopped while driving with G.D. in the car and arrested for identity theft. G.D. was removed from the vehicle by a police officer and given to the care of Gerald’s brother, who happened to be driving by the location where the arrest occurred. The case manager testified that Gerald had completed all aspects of his service plan prior to placement, contacted her about his arrest, and retrieved G.D. from the care of his brother the same day Gerald was arrested. Her office recommended G.D. remain with his father. A new service plan prohibited Gerald from participating in any “criminality,” and required him to attend therapy to address the arrest and to engage in parent coaching. The foster mother testified that G.D. suffered from asthma, sleep apnea, and a seizure disorder and took various medications. The trial court vacated its order granting placement discretion, finding there were safety concerns and questioning Gerald’s ability to teach G.D. right and wrong due to his criminal history. The trial court noted Gerald’s progress but considered the recent arrest as a step backward.

¶ 5 A March 2012 service plan indicated Gerald’s whereabouts were unknown. The case manager informed the court in April 2012 that Gerald had been arrested in March for home invasion and domestic battery, for which he pleaded guilty and was ultimately sentenced to a three-year term of imprisonment. A September 2012 service plan revealed that Gerald was in the Will County jail and had not participated in any service tasks for six months. On October 18, 2012, the State filed a petition to terminate Gerald’s parental rights. A January 25, 2013, report filed with the trial court by DCFS stated that Gerald had not visited G.D. in 15 months.

¶ 6 The State filed an amended petition to terminate and a hearing took place. The case manager testified. Because Gerald had been compliant with his service tasks, DCFS felt it was appropriate to place G.D. with his father. The caseworker believed a bond existed between Gerald and G.D., but the October 2011 arrest was traumatic for G.D. Based on a recommendation from G.D.'s therapist, visitation was suspended following the arrest. Gerald's car was seized, he was unable to pay his rent, and he became homeless. Gerald's service plan required Gerald to maintain sobriety, attend Narcotics Anonymous (NA) meetings, and submit to random drug tests. He did not engage in any services after his October 2011 arrest, including a mandated drug test. The caseworker discovered Gerald was arrested again in March 2012 after she did a background check. Gerald did not initiate any contact with her or G.D. after his March 2012 arrest, although when she visited him in the county jail, Gerald expressed concern and interest for G.D. Gerald also did not maintain contact with her after his transfer to the IDOC in January 2013, until March 2013 when she received a letter from him. In the letter, Gerald expressed love and concern for his son, regret for his failure to contact the caseworker, gratitude to the foster parents, and his desire to work to obtain care of G.D. While in the IDOC, Gerald attended one session of a father's support group, but did not participate in substance abuse treatment.

¶ 7 During cross-examination by Gerald's attorney, counsel attempted to elicit testimony that Gerald had complied with particular service plan tasks prior to his October 2011 arrest. On the State's objection, the trial court found the information was not relevant as it did not concern Gerald's actions during the applicable time frames as set forth in the petitions to terminate. The amended petition to terminate set forth two time periods: October 2011 to July 2011 and March 2012 to December 2012. No services were available in the Will County jail that satisfied the

service task requirements. After Gerald was transferred to the IDOC, limited services were available. A copy of the Will County jail activity sheet indicating Gerald attended several AA/NA meetings and an IDOC cell pass for attendance at a fatherhood class were offered by Gerald and admitted by the trial court without objection. Also admitted into evidence were certified copies of Gerald's convictions for criminal damage to property, domestic battery and criminal trespass to a residence. Gerald's counsel submitted that his expected release date was September 2013. After a recess wherein Gerald conferred with counsel, his attorney informed the court that she advised Gerald of his right to testify and that he decided not to testify. On the trial court's inquiry, Gerald stated he did not want to testify.

¶ 8 The trial court found by clear and convincing evidence that Gerald was unfit for failing to maintain a reasonable degree of interest, concern, or responsibility for G.D.'s welfare. It noted that G.D. had been placed with his father but Gerald was arrested six days later; Gerald did not maintain contact with G.D. or DCFS from October 2011 to March 2012; and that Gerald initiated contact with the caseworker in May 2013 only after the petition to terminate was filed. The trial court also found that the State proved the depravity allegations by clear and convincing evidence after Gerald rebutted the presumption of depravity. The trial court noted Gerald engaged in some services while incarcerated but they were insufficient to establish rehabilitation. The trial court also noted Gerald had a misdemeanor conviction in 2005 and two misdemeanor convictions in 2006.

¶ 9 A best interest hearing took place. The foster mother testified that G.D. had been with her since he was three days old, excepting the 11-day period he was with his father. G.D. is a happy child, who calls her "mom" and her husband "dad." She and her husband adopted their 10-year-old daughter, who also has special needs, and would like to adopt G.D. G.D. and his

foster sister love each other. As a family, they host and attend picnics, birthday parties and gatherings with their extended families, which accept and love G.D. She has cared for him daily, including his special needs. He has asthma and takes medication for ADHD and for a seizure disorder. He also has sleep apnea and requires a monitor to help him sleep. His medication requires monitoring and G.D regularly sees a pediatrician, neurologist and pulmonary doctor. G.D. is in school, with a special education program and occupational therapy. He participates in karate and gymnastics classes, enjoys swimming and horseback riding, and attends church and Bible school. Elizabeth acknowledged she was in her late 50's and her husband in his early 60's, and indicated that arrangements had been made for her younger brother to care for the children if necessary. The foster father also testified, stating he is healthy and reiterating that he and his wife want to adopt G.D.

¶ 10 After the presentation of evidence, the trial court found it was in G.D.'s best interests that Gerald's parental rights be terminated. The trial court stated that the best placement for G.D. was with his foster parents, who knew his medical needs and were able to address them. In the court's view, Gerald did not know G.D. or his needs and was unable to care for him. The trial court granted the State's petition to terminate. Gerald appealed the termination of his parental rights, including the trial court's unfitness and best interest findings.

¶ 11 ANALYSIS

¶ 12 On appeal, Gerald challenges the trial court's findings that he was unfit and that it was in G.D.'s best interest that his parental rights be terminated. Gerald also maintains he was denied due process when the trial court neglected to admonish him regarding his failure to testify.

¶ 13 We turn first to Gerald’s assertion that the trial court erred in finding him unfit. Gerald objects to both unfitness grounds asserted by the trial court: failure to demonstrate a reasonable degree of interest, concern and responsibility, and depravity.

¶ 14 There is a two-step process for the termination of parental rights. 705 ILCS 405/2-29 (West 2012). The trial court must determine that the parent is unfit; if found unfit, the trial court then determines whether it is in the child’s best interest that his parent’s rights be terminated. 750 ILCS 50/1D (West 2012); 705 ILCS 405/2-29(2), (4) (West 2012). Grounds for unfitness include the parent’s “failure to maintain a reasonable degree of interest, concern or responsibility as to the child’s welfare” and depravity. 750 ILCS 50/1D(b), (i) (West 2012). The State must prove unfitness by clear and convincing evidence. *In re Jordan V.*, 347 Ill. App. 3d 1057, 1067 (2004). The trial court’s findings of unfitness are accorded great deference on review and we will not reverse the findings unless they are against the manifest weight of the evidence. *Jordan V.*, 347 Ill. App. 3d at 1067.

¶ 15 As to the first ground of unfitness determined by the trial court, failure to maintain a reasonable degree of interest, concern or responsibility for G.D.’s welfare, Gerald argues that the trial court erred in failing to consider his prior compliance with the service plan tasks, which resulted in the “return” of G.D. to him. Gerald submits the trial court should have looked at the totality of the circumstances and balanced his prior good acts with his current bad ones. Gerald submits that under the circumstances, he has maintained a reasonable degree of interest, concern and responsibility for G.D.

¶ 16 To determine whether a parent has demonstrated a reasonable degree of interest, concern or responsibility as to his child’s welfare, the trial court looks at the parent’s efforts to visit and maintain contact with the child, his inquiries into the child’s welfare and other examples

exhibiting interest, concern or responsibility. *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1064 (2006). A parent's completion of his service tasks and attendance at court proceedings are indicative of his interest, concern or responsibility. *Daphnie E.*, 368 Ill. App. 3d at 1065. When a parent is unable to visit with his child, he can show reasonable interest, concern or responsibility through letters, phone calls and gifts. *In re Gwynne P.*, 346 Ill. App. 3d 584, 591 (2004). A trial court should consider the parent's conduct in light of his circumstances, including difficulty in obtaining transportation, poverty, other's actions or statements that hinder or discourage visitation, and whether his failure to visit was due not to indifference to the child's welfare but to other conditions in the parent's life. *In re Adoption of Syck*, 138 Ill. 2d 255, 278-279 (1990).

¶ 17 The amended petition for termination of parental rights put forth two time frames during which it alleged Gerald failed to maintain a reasonable degree of interest, concern or responsibility for G.D. The time periods were October 2011 to July 2012 and March 2012 to December 2012. Since Gerald's October 2011 arrest and the removal of G.D. from his placement, Gerald has not seen his son. We acknowledge visitation was suspended by DCFS following Gerald's 2011 arrest. He did not, however, attempt to contact his case manager or seek to restore visitation with G.D. From October 2011 to March 2012, Gerald's whereabouts were unknown. In March 2012, his case manager discovered he was in custody in the Will County jail. On her initiative, the case manager visited Gerald and sent him letters to keep him informed about G.D. The case worker observed that a bond had been established between Gerald and his son prior to October 2011 and acknowledged that Gerald's compliance with his service tasks resulted in G.D.'s placement in Gerald's care.

¶ 18 Gerald's attorney attempted to elicit testimony from the case manager about the particular service tasks Gerald had completed prior to October 2011. Before this court, Gerald argues that the trial court erred when it sustained the State's objection on relevance grounds. We find there was no error. The relevant time periods for the trial court's consideration were October 2011 to July 2012 and March 2012 to December 2012. Actions prior to October 2011 are irrelevant regarding Gerald's degree of interest, concern and responsibility for the time periods at issue. The record established Gerald's compliance with his service tasks and the resulting placement of G.D. in his care. Gerald failed to maintain his progress after he was arrested in October 2011, the beginning date alleged in the petition to terminate. He dropped out of the purview of DCFS, did not engage in any of his service tasks, and lost all contact with G.D. Although the case manager testified as to Gerald's love for his son and that Gerald expressed interest and concern for G.D. while in custody in Will County, Gerald did not initiate contact with the case manager and did not attempt any sort of communication with G.D., such as letters or phone calls. He did not send G.D. any gifts or provide for his care in any manner. We find that the trial court's finding of unfitness based on Gerald's failure to maintain a reasonable degree of interest, concern or responsibility for G.D. was not against the manifest weight of the evidence.

¶ 19 Regarding the second unfitness ground, depravity, Gerald argues that after he rebutted the presumption of depravity that arose from evidence of his prior convictions, the State failed to present evidence to establish depravity. Although the grounds of unfitness was proved as discussed above, we will address this second ground relied on by the trial court to resolve Gerald's argument regarding the presumption of depravity. *In re D.D.*, 196 Ill. 2d 405, 422 (2001) (unfitness finding will stand if supported by a single statutory ground).

¶ 20 Depravity is defined as “ ‘an inherent deficiency of moral sense and rectitude.’ ” *In re J.A.*, 316 Ill. App. 3d 553, 561 (2000), quoting *Stalder v. Stone*, 412 Ill. 488, 498 (1952). There is a statutory presumption of depravity where a parent has three felony convictions, at least one of which occurred within five years of the filing of the petition to terminate. 750 ILCS 50/1D(i) (West 2012). Admittance of certified copies of a parent’s convictions into the record creates the rebuttable presumption of depravity. *In re Addison R.*, 2013 IL App (2d) 121318, ¶ 23. A parent may offer evidence to show that he is not depraved in spite of his convictions. *Addison R.*, 2013 IL App (2d) 121318, ¶ 24, quoting *In re Shanna W.*, 343 Ill. App. 3d 1155, 1167 (2003). Once the parent rebuts the presumption, it ceases to exist and the State must prove depravity by clear and convincing evidence. *Addison R.*, 2013 IL App (2d) 121318, ¶ 24, quoting *J.A.*, 316 Ill. App. 3d at 562. A parent’s depravity may be established by a series of acts or course of conduct indicating “ ‘a moral deficiency and an inability to conform to accepted morality. [Citation]’ ” *Shanna W.*, 343 Ill. App. 3d at 1166, quoting *In re S.H.*, 284 Ill. App. 3d 392, 396 (1996).

¶ 21 Here, the trial court found that Gerald had rebutted the presumption of depravity but that the State had proved his depravity by clear and convincing evidence. On our review of the record, it is unclear on what basis the trial court found Gerald rebutted the presumption but we give deference to its conclusion as it was in a better position to assess Gerald’s credibility and character. *J.A.*, 316 Ill. App. 3d at 563. Nevertheless, we agree with the trial court’s conclusion that the State presented sufficient evidence proving Gerald’s depravity. The trial court reviewed Gerald’s convictions, including criminal damage to property in 2005, with a probation revocation and a resulting term of incarceration; and the 2012 charges of domestic battery and criminal trespass to residence, both Class 4 felonies resulting in concurrent three-year terms of imprisonment. The trial court also noted that Gerald had misdemeanor convictions, including

one in 2005 and two in 2006. The record establishes that Gerald had substance abuse issues and had attempted treatment several times without achieving any long term sobriety. Gerald's criminal behavior negatively affected his ability to provide for G.D. physically, emotionally or financially. We find that the trial court did not err when it determined that Gerald was unfit on the grounds of depravity.

¶ 22 We turn now to the trial court's conclusion that it was in G.D.s' best interest to terminate Gerald's parental rights. Gerald argues that the trial court's determination was not supported by the evidence, pointing to his positive behavior before his October 2011 arrest and the age of the foster parents as factors weighing against the trial court's finding.

¶ 23 After it proves the parent unfit, the State must then establish by a preponderance of the evidence that it is in the child's best interest to terminate the parent's rights. 705 ILCS 405/1-3(1) (West 2012). At the best interest hearing, the focus shifts to the child and the parent's interest in maintaining a parent-child relationship yields to the child's interest in a stable and loving home. *In re D.T.*, 212 Ill. 2d 347, 363-64 (2004). There are a number of factors the trial court considers for termination purposes, including: the child's physical safety and welfare of the child, including food, shelter, health, and clothing; the development of the child's identity; familial, cultural, and religious background and ties; the child's sense of attachments; his wishes and long-term goals; his community ties; the child's needs for permanence, stability and continuity of relationships; and the uniqueness of every family and child. 705 ILCS 405/1-3(4.05) (West 2012). The trial court may also consider the nature and length of the child's relationship with his present caretaker and the effect that a change in placement will have on the child. *In re Jaron Z.*, 348 Ill. App. 3d 239, 262 (2004).

The trial court emphasized that because of G.D.'s special needs, the best placement for him was with his foster parents, who had been attending to those needs since G.D. was a few days old. The trial court found, in contrast, that Gerald did not know G.D., was not familiar with his needs, and was not able to take care of him. The trial court expressed G.D.'s need for a stable caretaker and determined it was not Gerald but the foster parents. Our review of the best interest factors supports the trial court's findings. There were no safety issues at the foster home and the foster parents provided for G.D.'s food, shelter, health and clothing for almost seven years. The foster mother testified about G.D.'s physical needs, his medical care, medication and doctor's visits, and that she and her husband continue to meet G.D.'s special needs. The foster parents are aware of the cultural issues involved in raising an African-American child, but point to G.D.'s foster sister, who is also African-American, and explained various means they use to address the issue and facilitate cultural identity. G.D. has spent nearly his entire life with the foster family, in the same home, with his own bedroom. He calls his foster parents "mom" and "dad." G.D. identifies with the foster family. He is accepted by his foster parents' extended families and participates in family celebrations. He attends school and is involved in extracurricular activities in the community. G.D.'s foster parents want to adopt him and are committed to doing so. In contrast, G.D. has not seen Gerald since October 2011, when G.D. was traumatized after witnessing Gerald's arrest sufficient to warrant visitation be suspended. He has not provided for G.D.'s food, shelter, clothing or medical needs. Gerald did not maintain any ties with G.D. or communicate with him through letters or phone calls. At the time of the termination proceedings, Gerald was incarcerated. We find the trial court's determination that it was in G.D.'s best interest that Gerald's parental rights be terminated was not against the manifest weight of the evidence.

¶ 25 Our final issue to consider is whether Gerald was denied due process. He maintains that the trial court's failure to inform him that a negative inference arises from his decision not to testify served to deny him due process. Because Gerald did not raise this issue in the trial court, he asks this court to review it under the plain error doctrine.

¶ 26 A reviewing court will consider an unpreserved error under the plain error doctrine when (1) the evidence is close, regardless of the seriousness of the error, such that the error threatens to tip the scales of justice against him, or (2) the error is serious, regardless of the closeness of the evidence, and threatens the fairness of the trial and challenges the integrity of the justice system. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). In order for there to be plain error, there must first be an error. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 27 We find there was no error and plain error review is improper. We reject Gerald's assertion that a negative inference arises from his failure to testify and that the trial court is required to inform him about the inference. Gerald likens his circumstance to a defendant who enters a guilty plea and asserts he is entitled to be admonished regarding his right to testify. Gerald offers no case law in support of his position and there is none to support it. We note that there is no requirement that the trial court advise a defendant regarding his right to testify or to inquire whether a waiver of the right to testify is knowing and voluntary in criminal proceedings. *People v. Smith*, 176 Ill. 2d 217, 235 (1997). Gerald provides no valid reason that we should place a requirement in termination proceedings. The termination of a parent's rights is a civil proceeding and the due process right afforded the respondent is fundamental fairness in the proceedings. *In re A.H.*, 359 Ill. App. 3d 173, 182 (2005). The record does not establish that Gerald's decision not to testify affected the fundamental fairness of the termination proceedings.

Because the trial court was not required to admonish Gerald regarding his right to testify, its failure to do so does not constitute error.

¶ 28 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.